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No. 85-455

In the Supreme Court of the United States

OCTOBER TERM, 1985

POLO FASHIONS, INC., PETITIONER

v.

STOCK BUYERS INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erroneously reversed respondents' criminal contempt convictions because the attorneys who were appointed by the court to prosecute the contempt also represented petitioner in the underlying civil case.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Following a jury trial in United States District Court for the Southern District of Ohio, respondents were convicted of criminal contempt, in violation of 18 U.S.C. 402. The district court sentenced each of the individual respondents to six months' imprison-

ment and a fine of $100,000, to be paid to petitioner Polo Fashions. The corporate respondents were jointly fined $100,000.

1. Petitioner distributes men's clothing under its registered trademarks and tradenames, which include, inter alia, POLO, POLO BY RALPH LAUREN, and a representation of a mounted polo player (C.A. App. 26, 34-36). Respondents Sergio and Ladowitz are the only two shareholders and officers of respondent Stock Buyers International, Inc. (Stock Buyers), a firm that purchases and sells wearing apparel at wholesale (C.A. App. 207). Respondent Sergio is the sole shareholder of respondent Columbus Business Systems, Inc. (CBS), which shares an address with Stock Buyers. While CBS was held out as a retailer of electronic business equipment, respondents Sergio and Ladowitz used it to obtain merchandise for resale by Stock Buyers. *Id.* at 37, 207.

On January 21, 1982, petitioner filed suit in the United States District Court for the Southern District of Ohio, alleging that respondents Sergio, Stock Buyers, and CBS were engaged in counterfeiting activities that infringed petitioner's registered trademarks (C.A. App. 11-25). On February 3, 1982, those three respondents consented to the entry of a preliminary injunction (Agreed Order) barring them, their agents, and persons acting in concert with them from, inter alia, using any Polo logo, tradename or trademark or any counterfeit of those names or marks in connection with the sale of unauthorized goods. The Agreed Order also barred them from infringing petitioner's registered trademarks and falsely describing or representing goods as being petitioner's merchandise. See Pet. App. A2; C.A. App. 26-37.

After the Agreed Order had been entered, respondents Sergio and Ladowitz operated CBS as East-West Trading Co. (East-West) and Stock Buyers as S & L Liquidators (S & L) (C.A. App. 476). Except for the change of names, the firms' functions remained the same: CBS/East-West acquired counterfeit Polo merchandise for resale by Stock Buyers/S & L. In the fall of 1982, respondents Sergio and Ladowitz approached Schottenstein's, a department store, about the sale of Polo shirts. Upon respondents' assurances that they were selling genuine Polo shirts, Schottenstein's purchased in excess of $415,000 worth of counterfeit shirts between October 1982 and March 1983. *Id.* at 323-330.

2. a. In August 1983, petitioner filed a motion in district court for an order to show cause why respondents should not be held in civil and criminal contempt for violating the Agreed Order (Pet. App. A2; C.A. App. 47). The motion was supported by a declaration of Milton Springut, who was trademark counsel for petitioner (C.A. App. 42-46). Petitioner also sought to have its attorneys appointed to prosecute the criminal contempt (Pet. App. A2). On August 24, 1983, the district court entered an order in which it found probable cause to believe, on the basis of petitioner's submissions, that respondents had willfully violated the terms of the Agreed Order (*id.* at D1-D2), and it entered a formal statement of charges on the same date (C.A. App. 49-53; see also *id.* at 54-58 (amended statement)).[1] The court elected to try

[1] Respondents moved to vacate or dismiss the statement of charges on the grounds that it failed to allege facts sufficient to constitute criminal contempt and that it failed to establish probable cause that they had willfully violated the injunction. Those motions were denied (Pet. App. E4-E6).

the criminal contempt charges first, in order to afford the additional protections available in criminal proceedings (Pet. App. D1-D2). Pursuant to Fed. R. Crim. P. 42(b), the court then appointed petitioner's attorneys to prosecute the criminal contempt charges (Pet. App. D2). The court explained that it had selected petitioner's counsel to prosecute the contempt charges in order to "facilitate an expeditious resolution of these [charges] since [petitioner's] counsel is fully familiar with this matter" (*ibid.*). No one from the Office of the United States Attorney appeared in the proceedings (*id.* at A3).

Respondents then moved for an order vacating the appointment of petitioner's counsel to prosecute the criminal contempt, on the ground that counsel had a " 'distinct private interest in the outcome of the case' " (Pet. App. E6). The district court denied respondents' motion (*id.* at E6-E7). Relying on the Second Circuit's decisions in *Musidor, B.V.* v. *Great American Screen*, 658 F.2d 60 (1981), cert. denied, 455 U.S. 944 (1982), and *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (1935), cert. denied, 299 U.S. 603 (1936), the court concluded that neither Rule 42 nor the Due Process Clause requires the district court to designate counsel from the United States Attorney's Office to prosecute a criminal contempt and that the court should be permitted to appoint counsel for the opposing party in the underlying civil litigation because of his familiarity with the case (Pet. App. E7). The district court acknowledged that when the moving party's counsel is appointed as the prosecuting attorney, "some degree of self-serving involvement is inevitable" (*ibid.*). However, the court believed that such involvement should not bar the appointment of petitioner's counsel, because counsel would be required to establish

beyond a reasonable doubt that respondents willfully violated the injunction (*ibid.*).[2]

b. At the conclusion of a four-day jury trial, all four respondents were convicted. Counsel for petitioner Polo Fashions submitted a sentencing memorandum, in petitioner's name (C.A. App. 233-250), urging the imposition of a sentence on each individual respondent of six months' imprisonment and a fine in the amount of $500,000, to be paid to petitioner (*id.* at 237, 247). The court also offered counsel for petitioner an opportunity to make a statement at the sentencing hearing (*id.* at 247).

Respondents Ladowitz and Sergio were each sentenced to a term of six months' imprisonment and a fine of $100,000, to be paid to petitioner (see 18 U.S.C. 402). The court specified that if the fines were not paid at the expiration of six months, the individual respondents were to stand committed until the fines were paid or until the respondents were otherwise discharged by law (C.A. App. 252, 253). The court also ordered that the corporate respondents, Stock Buyers and CBS, be jointly fined in the amount of $100,000 (*id.* at 254). That fine was apparently also payable to petitioner (see *id.* at 237).

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[2] Respondents moved for a jury trial under 18 U.S.C. 402 and 3691. The latter statute provides that an alleged contemnor is entitled to a jury trial, "which shall conform as near as may be to the practice in other criminal cases," if the act constituting the alleged contempt is also a criminal violation under any federal statute or under the law of the state where the act occurred. Because the sale of counterfeit goods is a criminal offense under Ohio Rev. Code Ann. § 2913.32 (page 1982), the district court granted respondents' motion (C.A. App. 159-161). The district court also concluded that discovery in the underlying civil case should not be stayed pending the outcome of the charges of criminal contempt (*id.* at 122-125).

3. The court of appeals reversed the contempt convictions (Pet. App. A1-A14). The court held, in the exercise of its supervisory powers, that it was an abuse of discretion for the district court to appoint the attorneys for petitioner to prosecute the charges of criminal contempt (*id.* at A10-A14).[3]

The court of appeals recognized that criminal contempt was once considered to be sui generis and did not call for the full panoply of safeguards traditionally required in a criminal proceeding. However, the court observed that in *Bloom* v. *Illinois*, 391 U.S. 194 (1968), a case involving the right to trial by jury, this Court had stated that "a defendant in a criminal contempt action has the right 'not to be subjected to serious criminal punishment without the benefit of *all* the procedural protections worked out carefully over the years and deemed fundamental to our system of justice' " (Pet. App. A12, quoting 391 U.S. at 208 (emphasis added by the court of appeals)).

One of the necessary procedural protections with respect to criminal contempt, the court of appeals concluded, is the requirement that criminal cases "be prosecuted by disinterested, publicly employed attorneys" (Pet. App. A12). The court reasoned that a privately employed attorney has the ethical obligation of advancing his client's interests (*ibid.*); a public prosecutor, by contrast, is charged with seeing that " 'justice shall be done' " and is " 'in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer' " (*id.* at A13, quoting *Berger* v.

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[3] The court expressly did not decide that the appointment of petitioner's counsel "constitute[d] a per se due process violation" (Pet. App. A12).

United States, 295 U.S. 78, 88 (1935)). In the court's view, it was "too much to expect an attorney committed to his [private] client and the client's cause to recognize the 'twofold aim' referred to in *Berger* when acting as prosecutor in proceedings which, if successful, can benefit immeasurably that client and his cause" (Pet. App. A14). The court acknowledged that prosecutors employed by the federal government might also overlook their obligations on occasion and become too concerned with obtaining convictions. But it explained that "this overzealousness does not have its roots in a conflict of interest[,]" such as that which results from "the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction" (*ibid.*).

The court of appeals did not hold, however, that the United States Attorney must actually prosecute all criminal contempts. To the contrary, it made clear that "[i]f the United States Attorney should decline to prosecute upon request, then the district court may appoint one or more disinterested attorneys to do so" (Pet. App. A14). The court held only that although counsel for an interested party could be appointed to *assist* the United States Attorney or the disinterested private attorney, counsel for the interested party "may not conduct criminal contempt proceedings as sole or primary counsel" (*ibid.*).

ARGUMENT

1. In our view, the court of appeals did not exceed its supervisory authority by establishing a general rule barring the appointment of counsel for an interested private party to prosecute charges of criminal contempt. As this Court recently reaffirmed, the courts of appeals have the power "to mandate 'pro-

cedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'" *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985), slip op. 6 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). See also *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 n.10 (1980); *Barker* v. *Wingo*, 407 U.S. 514, 523, 530 n.29 (1972). This principle has particular application to the development of procedures for the exercise of the contempt power, which has been viewed as essential to the ability of the federal courts to enforce their authority. See, *e.g.*, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873); *Ex parte Terry*, 128 U.S. 289, 302-304 (1888); *In re Debs*, 158 U.S. 564, 594-595 (1895). The court of appeals' reliance on its supervisory authority in this case also may be viewed as an aspect of the recognized power of the federal courts to regulate and supervise the conduct of attorneys appearing before them (cf. 28 U.S.C. 1654), to the extent such matters are not separately addressed by federal law or within the domain of another branch (*e.g.*, 28 U.S.C. 547). See, *e.g.*, *United States* v. *Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring); *United States* v. *Agosto*, 675 F.2d 965, 969, 976-977 (8th Cir.), cert. denied 459 U.S. 834 (1982); *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978); Fed. R. Crim. P. 44(c) and advisory committee note. Cf. *Nix* v. *Whiteside*, No. 84-1321 (Feb. 26, 1986).

Nor is the rule adopted by the court of appeals in this case an unreasonable one. In the modern federal system, those who prosecute crimes are "public officials" who "must serve the public interest." *Mc-*

shall v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980). See also *Berger* v. *United States*, 295 U.S. 78, 88 (1935). "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall* v. *Jerrico*, 446 U.S. at 249-250. Consistent with these principles, federal statutes bar employees of the Department of Justice from participating in prosecutions in which they or persons with whom they are affiliated have a financial or personal interest. 18 U.S.C. 208; 28 U.S.C. 528. As the court of appeals pointed out (Pet. App. A10-A11), standards of conduct adopted by the legal profession likewise call for a disinterested prosecutor. See, *e.g.*, Model Code of Professional Responsibility EC 7-13 (1983). Furthermore, the general ethical prohibition against conflicts of interest (*id.* at Canon 5) raises a serious question about the appropriateness of appointing an attorney who owes his principal duty of loyalty to a private client to prosecute a related criminal contempt on behalf of the public.

This is not to say that a criminal contempt prosecution is in all respects identical to other proceedings in which conflicts of interest may arise. Where a criminal contempt proceeding is initiated by the court, the actual "prosecutorial decision" (*Marshall* v. *Jerrico*, 446 U.S. at 249) is effectively taken away from the attorney appointed by the court to present the case. In addition, the historical role of the civil litigant or his attorney as an informant or relator in contempt proceedings and the recognition of the speical interest the civil litigant has in the matter (see 18 U.S.C. 402 (fines may be paid to party injured)) suggest that the Constitution may tolerate a greater

role in criminal contempt proceedings for the attorney for an interested private party than would be permitted in the case of other crimes. Cf. Pet. App. A14.

On the other hand, in spite of its sui generis nature as an historical matter, criminal contempt shares many of the features of more conventional crimes. Criminal contempt proceedings "are between the public and the defendant, and are not a part of the original cause" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911)), and, for purposes of the rights of the defendant, contempt has been regarded by this Court as "a crime in the ordinary sense" (*Bloom* v. *Illinois*, 391 U.S. at 201). Against this background, we cannot say that the court of appeals erred in adopting a rule barring counsel for an interested private party from assuming the lead role in prosecuting a case of criminal contempt. This is particularly so where, as here, conviction may lead to a sentence of imprisonment. Cf. *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972).

2. Of course, a court of appeals may not exercise its supervisory power in a manner that actually conflicts with the Constitution or an Act of Congress. *Thomas* v. *Arn*, slip op. 7-8. There is, however, no such inconsistency here. The Constitution surely does not *mandate* that counsel for an interested private party be appointed by a court to prosecute a criminal contempt; nor can the Constitution be said to prohibit a court from automatically deeming such counsel to be disqualified in the matter.

There likewise is no inconsistency with statutory provisions governing the subject of contempt. Congress has recognized the power of the federal courts to punish contempts since the enactment of Section 17

of the Judiciary Act of 1789, ch. 20, 1 Stat. 83.[4] Section 17 did not "prescribe any special procedure for determining a matter of contempt," and it accordingly left the mode of proceeding "to be determined according to such established rules and principles of the common law as were applicable to our situation." *In re Savin*, 131 U.S. 267, 275-276 (1889). Although the reach of the contempt power was curtailed by the Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. 488,[5] Congress did not otherwise prescribe detailed procedures for the exercise of the courts' powers to punish for contempt. See *Green* v. *United States*, 356 U.S. 165, 169-173 (1958). And except for certain specified limitations—principally the right to a jury trial (see 18 U.S.C. 402 and 3691) —Congress still has not itself prescribed such procedures or established standards regarding the selection of counsel who may assist the courts in conducting criminal contempt proceedings.[6] Congress instead has

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[4] Section 17 (1 Stat. 83) provided in relevant part that the courts of the United States "shall have power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same * * *."

[5] See *Bloom* v. *Illinois*, 391 U.S. 194, 203-204 (1968); *Nye* v. *United States*, 313 U.S. 33, 45-48 (1941).

[6] We do not agree with respondents' contention (Mot. to Dis. 2-3) that the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) and 28 U.S.C. 547 require the participation of the United States Attorney in all punishments for criminal contempt imposed by the federal district courts. The Appointments Clause permits Congress to vest the appointment of "inferior Officers" of the United States not only in the President and the Heads of Departments, but also in the "Courts of Law." See 28 U.S.C. 547 (authorizing the district court in a district in which the office of United States Attorney is

left to this Court the development of procedures to be followed in the imposition of punishment for criminal contempt (see Act of Nov. 21, 1941, ch. 492, 55 Stat.

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vacant to appoint a United States Attorney to serve until the vacancy is filled). Accordingly, assuming arguendo that an attorney appointed by a district court to participate in contempt proceedings is to be regarded as an Officer of the United States for purposes of the Appointments Clause, the manner of his appointment comports with that Clause. Respondents' reliance on *Buckley* v. *Valeo*, 424 U.S. 1 (1976), in support of their Appointments Clause argument therefore is misplaced as well.

To be sure, the actual prosecution of federal crimes is uniquely the responsibility of the Executive Branch. *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967); *United States* v. *Cox*, 342 F.2d 167, 193 (5th Cir.), cert. denied, 381 U.S. 935 (1965). See also *Buckley* v. *Valeo*, 424 U.S. at 128; *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1868). And the crime of contempt may be prosecuted in the same manner as other crimes: by indictment or information. Fed. R. Crim. P. 7(a). See, *e.g.*, *United States* v. *Squartino*, 778 F.2d 734 (11th Cir. 1985); *United States* v. *Williams*, 622 F.2d 830, 837-838 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Morales*, 566 F.2d 402, 404 (2d Cir. 1977). When the prosecution is initiated in that fashion, it must be under the direct control of the Attorney General and United States Attorney. 28 U.S.C. 547(1). However, Rule 42(b) contemplates that a criminal contempt proceeding may also be initiated by the court, by means of a show cause order or similar notice to the accused. In that event, at least where the United States Attorney has declined prosecution and the contempt by a private party does not arise out of civil or criminal litigation to which the United States or an agency or officer thereof is a party (see *Frank* v. *United States*, 384 F.2d 276, 278 (10th Cir. 1967), aff'd on other grounds, 395 U.S. 147 (1969)), we do not believe that either the Appointments Clause or 28 U.S.C. 547(1) bars a court from appointing a private attorney to serve as the prosecutor for the contempt proceedings.

779), and this Court has implemented that authority through the promulgation of Fed. R. Crim. P. 42.

The court of appeals' exercise of its supervisory authority in this case does not conflict with Rule 42(b). It is true that the Second Circuit has relied upon Rule 42(b) in support of its practice of permitting counsel for a party to the underlying civil litigation to be appointed to prosecute a criminal contempt, on the ground that the advisory committee note cites *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936), in which that practice was endorsed. See *Musidor, B.V.* v. *Great American Screen*, 658 F.2d 60, 64-65 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982). See also *Universal City Studios* v. *N.Y. Broadway International Corp.*, 705 F.2d 94, 96-97 (2d Cir. 1983). However, the propriety of the appointment of private counsel was not directly presented in *McCann*, which primarily addressed the problem of ascertaining when a particular contempt should be regarded as civil or criminal. The *McCann* court observed that among the indicia used to determine the nature of the action is the character of the prosecutor, since a criminal contempt may be "prosecuted either by the United States or by the court to assert its authority" (80 F.2d at 214). The court recognized that when the United States Attorney brings a prosecution, the criminal nature of the action will be clear. The court also stated that in some instances, the judge may seek the assistance of the attorney for a party, "who will indeed ordinarily be his only means of information when the contempt is not in his presence" (*ibid.*). But because the character of the proceeding may be more equivocal in such instances, the *McCann* court concluded that the district judge can resolve any doubt by "enter[ing]

an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court" (*id.* at 215). Because the district court did not enter such an order in *McCann* itself, the court of appeals reversed the conviction.

Rule 42(b) was promulgated in 1944, after the decision in *McCann*. The first sentence of the Rule provides that a criminal contempt (except a summary contempt governed by Rule 42(a)) "shall be prosecuted on notice," and the second sentence specifies the contents of the notice, including "the essential facts constituting the criminal contempt charged." The third sentence then provides: "The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States [A]ttorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest." The notes of the advisory committee state that "to obviate the frequent confusion between criminal and civil contempt proceedings," the "requirement in the second sentence that the notice shall describe the criminal contempt as such * * * follows the suggstion made in *McCann* * * *." However, the advisory committee note says nothing about the source of the reference to appointed counsel in the third sentence of Rule 42(b); nor does it specifically endorse the statement in *McCann* that the attorney representing a private party in related civil litigation may be designated to prosecute the contempt.

In fact the third sentence does not specifically mention what role even a disinterested private attorney appointed by the court may play in the contempt proceedings, beyond filing the application for an order to show cause or order of arrest. Although we do not

read that omission to preclude the court from appointing a private attorney to prosecute the charges of contempt arising out of private litigation where the United States Attorney has declined prosecution, we likewise do not read the Rule to prohibit a court of appeals (or this Court) from exercising its supervisory power to prohibit counsel for an interested party from being selected for that purpose.

3. As explained above, the Second Circuit, in contrast to the Sixth Circuit in the instant case, has permitted the appointment of counsel for an interested private party to prosecute a criminal contempt. See *Musidor, B.V.* v. *Great American Screen, supra*; *United States ex rel. Vuitton Et Fils S.A.* v. *Klayminc*, 780 F.2d 179 (2d Cir. 1985), petitions for cert. pending, Nos. 85-1329 and 85-6207. The issue does not appear to have arisen with great frequency in other circuits. Dicta in the Fifth Circuit's decision in *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F.2d 312, 319-320 (1969), appears to prohibit prosecution by counsel for an interested private party, although the Fifth Circuit declined to reach that issue in a subsequent case in which it was more directly raised. See *United States* v. *McKenzie*, 735 F.2d 907, 910 n.11 (5th Cir. 1984). In *Midway Manufacturing Co.* v. *Kruckenberg*, 779 F.2d 624 (1986), the Eleventh Circuit remanded for the limited purpose of determining whether counsel for an interested private party was properly appointed in the particular circumstances presented, and it declined to decide whether there should be an absolute rule barring such appointments. Other courts of appeals have concluded that the interested private *party* cannot prosecute a criminal contempt, but have not addressed the question whether *counsel*

for the party may be appointed by the court to do so. *In re Lahm Industries, Inc.*, 609 F.2d 567, 569-570 (1st Cir. 1979); *Ramos Colon* v. *United States Attorney*, 576 F.2d 1, 5 (1st Cir. 1978); *Kienle* v. *Jewel Tea Co.*, 222 F.2d 98, 100 (7th Cir. 1955).

Because the Sixth Circuit in the instant case relied on its supervisory powers, the decision below does not squarely conflict with the decisions of the Second Circuit, as there is no requirement that different courts of appeals adopt identical rules in the exercise of their supervisory powers. Moreover, the Fifth Circuit, in *Brotherhood of Locomotive Firemen & Enginemen*, is the only other court of appeals to have addressed the question, and the reach of its holding is somewhat unclear. See *Midway Manufacturing Co.* v. *Kruckenberg*, 779 F.2d at 626; *United States* v. *McKenzie*, 735 F.2d at 910 n.11. Nonetheless, we believe that the questions raised by the appointment of counsel for an interested private party to prosecute a criminal contempt are sufficiently important to the administration of justice to warrant review by this Court, especially in light of the differing views of several courts of appeals in recent decisions regarding the propriety of the practice.

We note, however, that there is a substantial question regarding the standing of petitioner Polo Fashions to petition for a writ of certiorari to review the judgment of the court of appeals in this case. The Court has made clear that a proceeding for the imposition of criminal contempt sanctions is "a proceeding with the court, or, more properly, the Government, on one side and the defendants on the other" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 445). In a criminal contempt proceeding prosecuted by a private attorney appointed by the court, the at-

torney prosecuting the case does not act on behalf of a private party, but "as a representative of the United States" (*ibid.*). Ordinarily, a private party has no standing to challenge a prosecutorial decision or to seek review of a ruling against the prosecution in a criminal case. See *Diamond* v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 9; *Princeton University* v. *Schmid*, 455 U.S. 100 (1982); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Consistent with these principles, the First and Seventh Circuits have held that a private party in related civil litigation has no standing to prosecute a criminal contempt or to take an appeal in matters relating to the contempt proceedings. *Kienle* v. *Jewel Tea Co.*, *supra*; *In re Lahm Industries, Inc.*, *supra*; *Ramos Colon* v. *United States Attorney*, *supra*. See also *United States* v. *McKenzie*, *supra* (attorney appointed by court has no standing under 18 U.S.C. 3731 to appeal district court's dismissal of contempt proceedings).

Accordingly, notwithstanding the district court's order in this case that the fines be paid to petitioner, it may be that petitioner is not entitled to seek review of the judgment below in its own behalf and in its own name. For this reason, if the Court grants the petition for a writ of certiorari in this case, we suggest that the Court request the parties to address the question of petitioner's standing to petition for a writ of certiorari. In any event, because of the doubt regarding petitioner's standing, the Court may wish to consider also granting the pending petitions for a writ of certiorari seeking review of the Second Circuit's decision in *United States ex rel. Vuitton Et Fils S.A.* v. *Klayminc*, 780 F.2d 179 (1985), which do not present the same standing problem.